IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2840 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VADODARA MUNICIPAL CORPORATION

Versus

P H PANDYA

Appearance:

MR PRANAV G DESAI for Petitioner

PARTY-IN-PERSON for the Respondent.

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision:20/12/2000

C.A.V. JUDGEMENT

1. This Special Civil Application has already been admitted. With the consent of the parties, the matter is heard finally.

2. The present Special Civil Application has been filed by the Vadodara Municipal Corporation, by which they have challenged the order of the Appellate Authority under the Payment of Gratuity Act, 1972 dated 8.2.2000.

3. The petition has got a chequered history between the parties. The question which is raised in this petition is regarding the powers of the Appellate Authority under the Payment of Gratuity Act, 1972 to review its earlier order. It is the case of the Corporation in the petition that the respondent-employee had retired from the service of the Corporation from 28.2.1997 and at the time of his retirement, he was given all his terminal benefits as well as benefit of gratuity and that in the case which was registered as Case No.130 of 1997, the decision which was taken by the authority under the Payment of Gratuity Act has already been complied with by the Corporation. So far as the payment of gratuity is concerned, in spite of that, the respondent had given another application for amending the order which was passed earlier in Case No.130 of 1997 and the Controlling Authority under the Payment of Gratuity Act, by its order at Annexure `A' dated 4.11.1999, declined the said prayer for correcting the earlier order, but in appeal against the said order, the Appellate Authority under the Payment of Gratuity Act, by its order dated 8.2.2000, allowed the said appeal and directed the Corporation to pay all the benefits to the respondent-workman considering his continuous service by recalculating the gratuity in the revised pay scale. The aforesaid order which is Annexed as Annexure `E' in the Special Civil Application is challenged by way of this petition by the Corporation.

4. Mr.P.G.Desai, learned Advocate appearing for the Municipal Corporation, has argued that the Appellate Authority under the Payment of Gratuity Act has no power to review its earlier order and, therefore, the order in question is without jurisdiction and bad in law. He further submitted that even the earlier order passed by the Controlling Authority, which was confirmed by the Appellate Authority, was challenged by the Corporation by filing Special Civil Application No.6486 of 1998 and that Special Civil Application was dismissed by the High Court, meaning thereby, the order of the Authority was confirmed by the High Court in the Special Civil Application and the Letters Patent Appeal filed against the order passed by the learned single Judge in the said Special Civil Application was also dismissed. Thereafter, it was not open for the appellate authority to make any amendment in its earlier order and since it had become functus officio, the order in question, by which the earlier order is reviewed, is bad in law and without any authority.

5. Against the aforesaid argument, party-in-person,

Mr.Pandya submitted that even though he had retired since long, he has not been paid his retirement dues, i.e. P.F., medical benefit, L.T.C. etc., and he has also not been paid the amount of gratuity. According to him, his pay was also not properly fixed for the purpose of computing the amount of gratuity.

According to him, the Collector has also issued certificate on 4.4.2000 for quantifying the said amount regarding gratuity. He also further submitted that as per the Circular of the Corporation, the Corporation had absorbed 1674 workmen in permanent cadre between 1.1.1979 and 1.1.1980 and had given them benefit and the said benefit should have been made available to the petitioner. According to him, this Court should also give necessary direction to the Corporation to pay all the retirement dues of the petitioner with interest at the rate of 18% per annum plus the benefit of medical leave, arrears of gratuity and such other benefits, which were not given to him and in view of the delay, this Court should direct the petitioner Corporation to pay the dues with interest at the rate of 18% per annum. He also submitted that since he had come to the Court so many times for attending the matter, appropriate costs also should be awarded to him.

6. Before considering the rival submissions, at this stage, it is necessary to consider the factual background of the case :-

It seems that the respondent was appointed by the Vadodara Municipal Corporation by giving him designation of a Labourer in 1976. However, he was discharged from service on 1.9.1976. A dispute arose as regards the validity of the said order of discharge. Ultimately, the said dispute came to be referred to the Labour Court, Surat. The Labour Court held that the order of discharge was not proper and that the workman should be reinstated with continuity of service and back wages as a labourer. At that time, a contention was taken by the respondent-employee that though initially he was appointed as a Labourer, he was really made to work as a Clerk and, therefore, he was required to be reinstated as a Clerk. The Labour Court had kept the said question open. It seems that the respondent was again discharged from service in January, 1980 and dispute arose regarding the validity of the said order of discharge. In Reference No.10 of 1985, the Labour Court came to the conclusion that the petitioner was entitled to be reinstated as a labourer and that he should be paid back

wages from 21.1.1980 to 16.8.1981. Even at that time, it was the say of the respondent that he was really working as a Clerk and he should be absorbed permanently on the post of Clerk. The said Award was given on 26.9.1986. In between, Reference No.108 of 1973, made to the Industrial Tribunal at Ahmedabad with respect to the demand of the workmen that daily wage workers who had completed one year's service should be made permanent and should be given the same grade of a worker doing the work of the same nature, came to be decided by the said Tribunal. The Tribunal directed that certain workmen should be made permanent. However, even at the time of earlier dispute, which was pending before the concerned Authority, though the respondent-workman had claimed that he was working as a Clerk and he should be treated as a Clerk, the said issue was kept open, though passing observations were made in Reference No.248 of 1978, as the same was not referred to the Labour Court under Section 10 of the Act. Ultimately, Reference under Section 36A of the I.D. Act was made to the Labour Court about the aforesaid prayer of the respondent regarding giving the status of a Clerk from a particular date.

7. The aforesaid decision was challenged by the Corporation by way of Special Civil Application No.3800 of 1988. A Division Bench of this Court, by its Judgment dated December 13, 1988, dismissed the said petition with certain directions given in the judgment. The said judgment is produced at page 92 of the compilation. The Division Bench in the said judgment has also observed that, in fact, Reference under Section 10 of the I.D. Act should have been made instead of Section 36A of the Act. The Division Bench had also directed the Labour Commissioner to consider the whole question again and decide whether any Reference is required to be made under Section 10 or not. It was also directed to treat the said Reference as having been made under Section 10 of the Act. The aforesaid Special Civil Application was dismissed by this Court.

8. The aforesaid judgment was taken by way of Special Leave to Appeal (Civil) No.1955 of 1989 before the Supreme Court, but the same was dismissed and the aforesaid order of the Division Bench was confirmed by the Supreme Court. Thereafter, in Reference (IT) No.84 of 1989, the President of the Industrial Tribunal, Ahmedabad, by his Award dated 30.12.1989, directed the present petitioner to absorb the workman in the category of permanent Clerk/Tabulator and that too, with effect from 1.1.1980. In the aforesaid order, which was given by Mr.G.S. Barot, President of the Industrial Tribunal,

Ahmedabad on the aforesaid date, it was also further directed that the petitioner should pay to the workman concerned wages as a daily rated Clerk / Tabulator for the period from 1.8.1976 to 31.12.1979 and the petitioner was also directed to pay wages to the workman as a permanent Clerk / Tabulator with effect from 1.1.1980 till the date of reinstatement along with the consequential benefits given to other clerks in the concerned Department. The aforesaid Award was also challenged before this Court by the Corporation by way of Special Civil Application No.3341 of 1990. A Division Bench, by its judgment and order dated April 23, 1990, rejected the said Special Civil Application. Accordingly, upto the aforesaid stage, there was an order in favour of the present respondent to the effect that he should have been treated as a daily rated Clerk / Tabulator from 1.8.1976 to 31.12.1979 and he was to be treated as a permanent Clerk / Tabulator with effect from 1.1.1980. The aforesaid order was challenged before the Honourable Supreme Court by way of Civil Appeal No.3032 of 1991. The said order is annexed at page 158 of the compilation. The following order dated 29th July, 1991 was passed by the Supreme Court :-

> "... Appellant states that as a matter of concession the appellant is willing to reinstate respondent No.1 as a clerk and to pay him backwages on that footing as from 6th February, 1989, being the date on which the Reference No.84 of 1989 was filed. In view of that agreement we set aside the impugned judgment and substitute in its place an order in terms of the aforesaid concession. The order to be implemented within two months from today. Payment of back wages also be made within two months from today .... "

In view of the aforesaid order of the Supreme Court, the order of the Division Bench of this Court was substituted by the aforesaid order of the Honourable Supreme Court.

9. Thereafter, the controversy again resurrected when the respondent retired on attaining the age of superannuation on 28.2.1997. The petitioner-Corporation, for the purpose of gratuity, considered the services of the respondent-workman only with effect from 6.2.1989 on the ground that in view of the order of the Supreme Court, by which back wages were denied to him prior to 6.2.1989, he will not be entitled to any other benefits

prior to the aforesaid date. Therefore, initially when the question came before the Controlling Authority for payment of gratuity amount, the said contention was taken up by the Corporation and the Corporation considered eligible service of the respondent for the purpose of gratuity only from 6.2.1989 to 28.2.1997. The Controlling Authority, by order dated May 25, 1998, held that the workman was entitled to gratuity on the basis of continuity of service and he cannot be deprived of the gratuity by misconstruing the order of the Supreme Court. The aforesaid order was challenged by the Corporation by way of an appeal before the Appellate Authority, but the same was also dismissed. Against the said order, the petitioner-Corporation preferred Special Civil Applicaiton No.6486 of 1998. This Court, by its order dated 15.3.1999, dismissed the said Special Civil Application and Letters Patent Appeal No.473 of 1999 preferred against that order was also dismissed by the Division Bench.

10. Before the learned single Judge, in the aforesaid Special Civil Application No.6486 of 1998, it was argued by the petitioner-Corporation that the respondent-workman was not entitled to any arrears prior to 6.2.1989 and that his claim that he was working as a Clerk prior to 6.2.1989 has not been approved, in as much as, the Award made by the Labour Court to that effect has been set aside and, therefore, the said period cannot be computed for the purpose of gratuity payable to the respondent workman. However, negativing that contention, this Court in the said Special Civil Application held that continuance of service from 21.2.1976 is beyond the pale of doubt. The observation of the learned single Judge in the said Special Civil Application is required to be taken into consideration. It has been stated in the said order :-

> :...The dispute which was subject matter of award of the Industrial Tribunal dated 30.12.1989 was not in relation to termination of services or the continuation of service by the workman. It was proceedings on the premise that the workman was continuing in service, the dispute related only to the nature of duties performed by him so that his claim to high wages could be decided. The award was only for settling the dispute by giving daily rated wages as clerk/tabulator with effect from 1.7.1976 and thereafter from 1.1.1980 as a permanent clerk/tabulator i.e. to say

> with effect from 1.8.1986 by the said award the respondent workman became entitled to claim arrears of emoluments of clerk which were being paid to him. The petitioner got over this findings about actual nature of function by making a concession before the Hon'ble Supreme Court that it is prepared to treat the respondent workman as permanent clerk/tabulator with effect from 6.2.1989 the date when reference was made so as to end the controversy. This concession was accepted by the Supreme Court and the claim of the respondent workman to the emoluments of the post of clerk/tabulator was confined to with effect from 6.2.1989 as is apparent from the order of the Supreme Court which has been made part of the petition. These proceedings and the final order made by the Supreme Court nowhere impinges upon the question of period of continuity of the services whether in the capacity as a clerk or labour with the employer with effect from 21.2.1976.
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> The fact that notwithstanding orders were passed to terminate the services of the respondent workman by the Corporation, respondent continued in service with the Corporation since 21.2.1976 as a result of the two awards of labour court holding the termination to be invalid is not affected by the decision of the Supreme Court. It can further be assumed that his service upto 6.2.1989 could be treated in the capacity as contended by the Corporation and thereafter as a clerk as directed by the Supreme Court but in no event it could not be said that prior to 6.2.1989 the respondent workman was not in the employment of Corporation .... "

The learned single Judge has also observed further that the respondent's prior services were treated as continuous service without break in employment and since the termination was found to be invalid on both the instances, there cannot be said to be any interruption in his service. Therefore, the services of the concerned workman was treated as continuous service from 21.2.1976 until he retired on 28.2.1997. Ultimately, the order of

the Authorities under the Payment of Gratuity Act was confirmed by the learned single Judge and, according to the said order, the respondent workman was entitled to benefit of gratuity, treating his services as continued from 21.2.1976 till the date of superannuation. The aforesaid order was also confirmed in Letters Patent Appeal, as stated earlier. However, thereafter, on behalf of the present respondent, an application was again made to the Controlling Authority for amending the order passed in Case No. 130 of 1997, i.e. the original order of the Authority, which order was confirmed by the learned single Judge as well as by the Division Bench in Letters Patent Appeal, as stated above. That application was made to the Labour Commissioner, Vadodara by the respondent on 1.1.1999.

11. It was the case of the respondent that without pay fixation which is by virtue of the Vth Pay Commission recommendations, the earlier order dated 5.1.1998 passed in Case No.130 of 1997 should be amended by issuing Corrigendum and that the Corporation has not properly considered the actual amount which is required to be paid considering his service from 21.2.1976 till 28th February, 1997 for 21 years and they have not properly computed increment, D.A. and other benefits which were required to be given to the respondent. However, the Controlling Authority came to the conclusion that so far as the request of the respondent regarding non-payment of pensionary benefit, revised pay scale, L.T.C., Medical Leave, etc. is concerned, such prayer cannot be given by the Controlling Authority as it has no jurisdiction to grant such prayer. It was found by the Controlling Authority that the High Court in earlier writ petition and L.P.A. did not remand the matter to the authority, but the orders of the Controlling Authority and of the Appellate Authority were confirmed. It was, therefore, found that there was no question of effecting any change in the earlier order and so far as the question about non-payment of any other benefit except gratuity is concerned, the Authority under the Payment of Gratuity Act has no authority to give any direction. So far as the execution of the earlier order is concerned, it was stated by the Controlling Authority in the order that if the order is not complied with, it is for the High Court to see that the order is complied with, but it is not for the Controlling Authority to give any direction for the same. It was found in paragraph 3 of the order that whatever amount which was required to be given to the respondent by way of difference towards the gratuity in view of the benefit of the Vth Pay Commission

Recommendations, the same has been paid by the Corporation to the workman and on that ground it is not possible to amend the original order.

12. The aforesaid order of the Controlling Authority dated 4th November, 1999 was challenged by the respondent herein by way of an Appeal. The Appellate Authority found that in view of the observations of this Court in earlier Special Civil Application and Letters Patent Appeal, he cannot be deprived of the benefits treating his service as continuous. It was found by the Appellate Authority that the employee is required to be paid gratuity after taking into consideration his pay and on the basis of such pay, gratuity is required to be paid. Therefore, considering his continuity of service for the purpose of gratuity and other benefits like increments which were required to be paid in the revised pay scale, the same were required to be paid. Since it was not paid by the Corporation, gratuity is required to be paid on that basis after revising his pay and amount of gratuity may be paid to him. Accordingly, the authority was asked to re-calculate the amount after revising his pay for the purpose of gratuity. The aforesaid order is impugned in the present Special Civil Applicaiton.

13. Now, therefore, the question which requires consideration is whether the Appellate Authority could have passed fresh order of payment of some additional amount of gratuity by asking the Corporation to revise his pay scale or whether the Authority became functus officio in view of the fact that earlier order of the Controlling Authority as well as of the Appellate Authority were confirmed by the High Court and thereafter, whether the Controlling Authority or the Appellate Authority had any power again to pass fresh order in this connection. However, at one point of time Mr.Desai for the petitioner has stated that even whatever amount of gratuity which was required to be paid on the basis of the revised pay scale has also been paid and, in fact, the order of the Appellate Authority is not required to be complied with as, in substance, it has been complied with. Now, looking to the facts and circumstances of the case, as well as looking to the fact that the respondent workman has retired since long and in view of his submission that he has not yet received any pensionary or any other retirement benefit and especially looking to the fact that the petitioner is a Public Body, though prima facie, I find substance in the contention of Mr.Desai, the Authority once having passed an order, has no right to give any direction in the earlier order and, there is no power of review available to the Authority, I

deem it proper to direct the Corporation also that whatever benefits which were required to be given to the respondent-workman so far as payment of gratuity is concerned, considering his continuity of service from 1976 as per the earlier order if not complied with, should be complied with by the Corporation immediately. The respondent in his affidavit-in-reply has said that his benefits like LTC, medical benefits, pensionary benefits, etc., have not been paid to him. Even no ad hoc pension is given to him. So far as the order of the Appellate Authority is concerned, as stated earlier, though there is substance in the contention of Mr.Desai, it has no jurisdiction to review its earlier order as the earlier order has merged with the order of the High Court and to that extent, while setting aside that order, and having considered the fact that the respondent had retired since long back and had not been given his retirement dues, while setting aside the appellate order of the Authority under the Payment of Gratuity Act, I also direct the Corporation that if there is an error in calculating the gratuity amount, which is required to be considered on the basis of the revised pay scale from 1976 till the date of retirement, the same should be paid to the respondent. If that order has been complied with, as earlier stated by Mr.Desai, then, nothing further will be required to be done in so far as the payment of gratuity is concerned. However, it was expected from the public body like the Corporation to pay pension to the retired employee, instead of forcing him to wait for such a long time for the purpose of getting benefit of pension. Even the Corporation should have given ad hoc pension to him. Looking to the totality of the circumstances, and looking to the fact that the respondent has retired since long, I direct the Corporation if by this time, the said benefit is not given, to give such pensionary benefits and all other retirement benefits like P.F., etc., to the respondent-workman forthwith and also to give benefit of LTC, medical allowance, etc., if the same are not paid to him. This direction is required to be given in view of the fact that the concerned employee has retired since long and he has argued that since last many years, he has to knock the doors of the Court for getting Justice. I am conscious of the fact that in the petition of the Corporation unless there is a cross petition by the respondent, normally, the Court should not give such relief in favour of the respondent. However, in view of the chequered history of the case, and long battle of litigation and looking to the fact that the respondent has retired, it is expected from the Corporation to pay to him his legitimate dues as stated earlier. Though, of

course, the Corporation has challenged the order of gratuity only, but as a model employer and being a public Corporation, it is also expected from them to see that the matters are not dragged unnecessarily to the Court. Therefore, the aforesaid benefits, as stated earlier, may be given to the respondent. If the aforesaid benefits like pensionary benefits as stated earlier are not given, the same may be given to the respondent with interest at the rate of 18% per annum. The same should be made within a period of one month from today. So far as the question of gratuity is concerned, as stated earlier, though the order of the appellate authority may not be sustainable on the ground that after the earlier order, it has no power to review the said order again, especially when the said order was confirmed upto to the level of the High Court, however, if any amount of gratuity is required to be paid to the respondent, treating his service as continuous from 1976 and that if that order is not complied with, treating as continued service from 1976 till he retired, by giving benefit of revised pay scale to him, the same also may be given to the respondent by the Corporation.

At this stage, contention of the party-in-person is required to be considered to the effect that all other employees who have continued as daily rated employees for a particular number of years were given the benefit of permanency by the Award of the Industrial Tribunal and according to him, there was no reason to discriminate him from getting the said benefit. Even otherwise, in the earlier petition when the learned single Judge has already held that the respondent is entitled to the benefit of gratuity treating his service as continued from 21.2.1976, naturally, he will be entitled to his gratuity on the basis of the aforesaid date of 1976. Meanwhile, if any revision of pay scale was made, gratuity will be required to be paid on the basis of the revised pay scale.

In view of the fact that the respondent has complained that he had to incur expenditure for coming to Court since long, and in view of the fact that the retirement benefits have not been paid since long and the respondent is in a hard-pressed position, in the facts and circumstances of this case, the Corporation may also pay the costs of this petition, which the respondent had to defend, by paying costs of Rs.3,000/to the respondent-workman, as costs of the present litigation. It is clarified by the Corporation that it has paid certain amount during the pendency of this petition. Whatever amount which has been paid by the Corporation so

far, the same can be adjusted by the Corporation either towards payment of gratuity or even towards pensionary benefits. Whatever other benefits are required to be given regarding legitimate dues of the respondent, the same may be paid by the Corporation after adjusting the said amount from the amount which has been paid so far to the respondent-workman.

14. Subject to the aforesaid direction, so far as the impugned order at Annexure `E' is concerned, the same is set aside, but in the facts and circumstances of the case, the Corporation may carry out the directions given in this order for the purpose of putting an end to the long drawn controversy between the parties.

15. Petition is partly allowed. Rule is made absolute to the aforesaid extent, however, the costs of Rs.3,000/- may be paid to the respondent.

December 20, 2000 (P.B. Majmudar, J.)

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(apj)